

New Mexico Part B Continuous Improvement Visit

Enclosure – Verification Component

Scope of Review

During the verification component of the Continuous Improvement Visit (CIV), the Office of Special Education Programs (OSEP) reviewed critical elements of the State's general supervision and fiscal systems,¹ and the State's systems for improving child and family outcomes and protecting child and family rights. We also reviewed the State's policies and procedures for ensuring the appropriate tracking, reporting, and use of Individuals with Disabilities Education Act (IDEA) funds made available under the American Recovery and Reinvestment Act of 2009 (ARRA).

Methods

In reviewing the State's systems for general supervision, including the collection of State-reported data,² and fiscal management, and the State's systems for improving child and family outcomes and protecting child and family rights, OSEP:

- Analyzed the components of the State's general supervision and fiscal systems to ensure that the systems are reasonably calculated to demonstrate compliance and improved performance
- Reviewed the State's systems for collecting and reporting data the State submitted for selected indicators in the State's Federal fiscal year (FFY) 2009 Annual Performance Report (APR)/State Performance Plan (SPP)
- Reviewed the following—
 - Previous APRs
 - The State's application for funds under Part B of the IDEA
 - Previous OSEP monitoring reports
 - The State's Web site
 - Other pertinent information related to the State's systems³
- Gathered additional information through surveys, focus groups, or interviews with—
 - The State Director of Special Education
 - State personnel responsible for implementing the general supervision, data and fiscal systems
 - Local educational agency (LEA) staff, where appropriate
 - State Advisory Panel
 - Parents and Advocates

¹ As explained in the cover letter, OSEP will respond to the fiscal component of the review under separate cover.

² For a description of the State's general supervision system, including the collection of State reported data, see the State Performance Plan (SPP) on the State's Web site.

³ Documents reviewed as part of the verification process were not reviewed for legal sufficiency, but rather to inform OSEP's understanding of your State's systems.

I. General Supervision System

Critical Element 1: Identification of Noncompliance

Does the State have a general supervision system that is reasonably designed to identify noncompliance in a timely manner using its different components?

To effectively monitor the implementation of Part B of the IDEA by LEAs, as required by IDEA sections 612(a)(11) and 616, 34 CFR §§300.149 and 300.600, and 20 U.S.C. 1232d(b)(3)(E), the State must have a general supervision system that identifies noncompliance in a timely manner.

The New Mexico Public Education Department (NMPED) reports that LEAs in New Mexico conduct districtwide assessments and its State rules require that students with disabilities be provided accommodations and alternate assessments as required by their individualized education programs (IEPs) (NMAC 6.31.2.11). NMPED was unable to demonstrate that it has a mechanism to ensure that LEAs administering districtwide assessments provide appropriate accommodations and that alternate assessments are made available on districtwide assessments, in accordance with 34 CFR §§300.160 and 300.320(a)(6).

OSEP Conclusion

To effectively monitor the implementation of Part B of the IDEA by LEAs, as required by IDEA Part B sections 612(a)(11) and 616, 34 CFR §§300.149 and 300.600, and 20 U.S.C. 1232d(b)(3)(E), the State must have a general supervision system that identifies noncompliance in a timely manner including the provision that any LEAs administering districtwide assessments meet the requirements of 34 CFR §§300.160 and 300.320(a)(6). Based on the review of documents, analysis of data, and interviews with State and local personnel, as described above, OSEP concludes that the State does not have a general supervision system that is reasonably designed to identify noncompliance in a timely manner using its different components because the State does not have a mechanism for ensuring that LEAs administering districtwide assessments provide appropriate accommodations and that alternate assessments are made available on districtwide assessments, in accordance with 34 CFR §§300.160 and 300.320(a)(6).

Required Actions/Next Steps

The State must:

1. provide an assurance, within 90 days of the date of this letter, that NMPED will develop and implement written procedures to ensure that LEAs administering districtwide assessments meet the requirements of 34 CFR §§300.160 and 300.320(a)(6); and
2. provide evidence, with the FFY 2011 APR, due February 1, 2013, that the State has implemented the procedures to ensure that LEAs administering districtwide assessments meet the requirements of 34 CFR §§300.160 and 300.320(a)(6).

Critical Element 2: Correction of Noncompliance

Does the State have a general supervision system that is reasonably designed to ensure correction of identified noncompliance in a timely manner?

To effectively monitor the implementation of Part B of the IDEA by LEAs, as required by IDEA sections 612(a)(11) and 616, 34 CFR §§300.149 and 300.600, and 20 U.S.C. 1232d(b)(3)(E), the

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State must have a general supervision system that corrects noncompliance in a timely manner. In addition, as noted in OSEP Memorandum 09-02, Reporting on Correction of Noncompliance in the Annual Performance Report Required under Sections 616 and 642 of the Individuals with Disabilities Education Act, dated October 17, 2008 (OSEP Memo 09-02), in order to verify that previously-identified noncompliance has been corrected, the State must verify that the LEA: (1) is correctly implementing the specific regulatory requirements (i.e., achieved 100% compliance) based on a review of updated data such as data subsequently collected through on-site monitoring or a State data system; and (2) has corrected noncompliance for each child, unless the child is no longer within the jurisdiction of the LEA.

OSEP Conclusion

Based on the review of documents, analysis of data, and interviews with State and local personnel, OSEP concludes that the State's systems for general supervision are reasonably designed to correct noncompliance in a timely manner. However, without also collecting data at the local level, OSEP cannot determine whether the State's systems are fully effective in correcting noncompliance in a timely manner.

Required Actions/Next Steps

No action is required.

Critical Element 3: Dispute Resolution

Does the State have procedures and practices that are reasonably designed to implement the dispute resolution requirements of IDEA?

The State must have reasonably designed dispute resolution procedures and practices if it is to effectively implement: (1) the State complaint procedure requirements in 34 CFR §§300.151 through 300.153, and 20 U.S.C. 1221e-3; (2) the mediation requirements in IDEA section 615(e) and 34 CFR §300.506; and (3) the due process complaint requirements in IDEA sections 615(b)(6) – (8), 615(c)(2), 615(f) – (i), (k)(3) and (4), and (o) and 34 CFR §§300.507, 300.508, 300.509 through 300.517, and 300.532.

Due Process and State Complaint Model Forms

The IDEA regulations at 34 CFR §§300.153(b) and 300.508(b) specify the content requirements for filing due process and State complaints. NMPED uses model forms that, at the time of OSEP's site visit, requested information beyond that specified in the IDEA regulations. The New Mexico Administrative Code (NMAC) sets out that complaints of both types that do not include State-required information will be declined (NMAC 6.31.2.13(H)(2)(a), NMAC 6.31.2.13(I)(5-6)). The State reported that, in practice, NMPED does not decline due process and State complaints that are missing this additional information. On November 21, 2011, NMPED submitted updated model due process and State complaint forms but these forms do not consistently identify the information elements that are optional. Moreover, the State rule for declining due process and State complaints that do not contain the State-required content remains, on its face, inconsistent with IDEA requirements. NMPED has notified OSEP that the State is taking action to revise its State rules to make them consistent with IDEA requirements.

Authority of Due Process Hearing Officers

The IDEA provides parents an opportunity to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” 20 U.S.C. 1415(b)(6), see also 34 CFR §300.507. Whenever a complaint is received, the parent has a right to an impartial due process hearing. 20 U.S.C. 1415(f)(1) and 34 CFR §300.511(a). Subject to certain exceptions, “a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.” 20 U.S.C. 1415(f)(3)(E) and 34 CFR §300.513.

In *Chavez v. NMPED*, 621 F.3d 1275 (10th Cir. 2010) the court held that under the facts of that case, “[a]bsent a determination that it was providing direct services to [the child], NMPED was not responsible for the matters covered by due process hearings.” *Id.*, at 1283. The court noted that the **hearing officer** “properly excluded [NMPED] from proceedings meant to address subjects related to direct education of a child.” *Id.* Most importantly, the court noted that “the parents’ theory of liability was not beyond the pale-states may be held responsible for failing to provide services to disabled children.” *Id.*, at 1280 (citations omitted).

After *Chavez*, New Mexico enacted a State rule, NMAC 6.31.2.13(I)(3)(d), that reads:

“...the IDEA does not authorize due process hearing officers to consider claims asserting that the department should be required to provide direct services to a child with a disability pursuant to 20 USC Sec. 1413(g)(1) and 34 CFR §300.227 because the responsible public agency is unable to establish and maintain appropriate programs of FAPE, or that the department has failed to adequately perform its duty of general supervision over educational programs for children with disabilities in New Mexico; accordingly, a due process hearing is not the proper forum for consideration of such claims and the department will decline to refer such claims against it to a hearing officer; such claims may be presented through the State-level complaint procedure under Subsection H of 6.31.2.13 NMAC above.”

OSEP reviewed appointment letters to hearing officers where the State, not the hearing officer, determined that NMPED was not a proper party to the hearing and where the State expressly denied hearing officers the authority to hear claims against the State.

Neither the IDEA, nor the *Chavez* case grants the State the authority to decide whether the State educational agency (SEA) is a proper party to a due process hearing and to deny a hearing officer that authority. The *Chavez* court specifically acknowledged the *hearing officer’s authority* to dismiss the SEA as a party in certain circumstances. Thus, the State’s rule and practice are an encroachment on the *hearing officer’s authority* as granted by the IDEA and as affirmed by the *Chavez* court. NMPED has notified OSEP that the State is taking action to revise its State rule to make it consistent with IDEA requirements.

Additionally, under 34 CFR §300.508(d), a due process complaint “must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements” of the IDEA regulations.

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New Mexico developed a “Due Process Procedures Flowchart,” which is available on their Web site and that includes a procedure for NMPED’s Office of General Counsel (OGC) to review every due process complaint for sufficiency before referring the complaint to a hearing officer. (http://www.ped.state.nm.us/SEB/community/dl11/DPH_Procedure_chart_with_ADR_March_2010.pdf). The State informed OSEP that, in practice, NMPED’s OGC does not reject complaints based on a lack of sufficiency. On November 21, 2011, NMPED submitted a revised “Due Process Procedures Flowchart,” which clarifies that the OGC does not review complaints for sufficiency prior to referring the matter to a hearing officer. The updated document is not currently available on the NMPED Web site. The “Due Process Procedures Flowchart” that is currently available on NMPED Web site requires NMPED’s OGC to review due process complaints for sufficiency and is not consistent with the requirements in 34 CFR §300.508(d).

Tracking the Resolution Period

OSEP reviewed a selection of due process files and found that the State did not have a mechanism to consistently track the resolution period, consistent with the requirements in 34 CFR §§300.510(a) and 300.532(c)(3)(i). On November 21, 2011, NMPED provided an updated resolution tracking form which seems reasonably designed to track the resolution process. No further action is required related to resolution tracking procedures; however, NMPED must review the discussion and required actions related to Facilitated Individualized Education Program (FIEP) meetings in this Enclosure for necessary changes to the tracking form.

Resolution Meeting and Hearing Decision Timelines

The IDEA and its implementing regulations require that a resolution meeting be held “within 15 days of receiving notice of the parent’s due process complaint, and prior to the initiation of a due process hearing under §300.511.” 34 CFR §300.510(a). Under 34 CFR §300.510(b), unless an allowable timeline adjustment is made, if an LEA “has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.” Allowable adjustments to the 30-day period contemplate adjustments based on mediation or waiver of the resolution meeting but not other State-created dispute resolution mechanisms. 34 CFR §300.510. Unless the hearing officer grants a specific extension of time for the hearing decision, 34 CFR §300.515(a), requires that not later than 45 days after the expiration of the 30-day period, a final decision must be reached and a copy of the decision mailed to each of the parties.

NMPED uses an FIEP process as an alternative dispute resolution mechanism that is separate from resolution meetings and mediation. NMAC 6.31.2.7(C)(1) and (2). The New Mexico State rule indicates that a “resolution session between the parties must be convened by the public agency following a request for a due process hearing, unless the parties agree in writing to waive that option **or** to convene a[n] FIEP meeting **or** mediation instead...” NMAC 6.31.2.13(G)(2)(c)(ii)(emphasis added). “Parties to a due process hearing may choose to convene a[n] FIEP meeting ... instead of a resolution session... [an] FIEP meeting ... shall be completed not later than 14 days after the assignment of the IEP facilitator... by the SEB.” NMAC 6.31.2.13(I)(8)(b). The procedural safeguards include a similar discussion of the FIEP process. While the IDEA does not prohibit the use of other dispute resolution mechanisms, they must be utilized consistent with the specific IDEA requirements. That is, agreement to convene an FIEP alone is neither a basis for not conducting a resolution meeting nor for recalculating or

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adjusting the 30-day resolution period. This does not mean that the State must abandon this mechanism; rather, to the extent that the State continues to use the FIEP process as an alternative dispute resolution mechanism, it must properly address IDEA requirements regarding resolution meetings, resolution period timelines and hearing decision timelines.

As discussed above, on November 21, 2011, NMPED provided an updated resolution tracking form that addressed some of the concerns OSEP had noted; however, NMPED has not properly addressed the use of the FIEP consistent with IDEA requirements. Specifically, the form does not reflect that an FIEP is not an allowable adjustment to the resolution period or to the 45-day hearing timeline. Moreover, improper calculation of the resolution period results in improper calculation of the 45-day timeline for due process hearing decisions. Based on this, OSEP concludes that the State has not established appropriate policies, procedures and practices, in situations where the parents request an FIEP meeting, to ensure that a resolution meeting is held unless waived by the parties and that the 30-day resolution and 45-day hearing decision timelines are properly calculated and enforced. NMPED has notified OSEP that the State is taking action to revise its State rules to make them consistent with IDEA requirements.

Limitations on Due Process Hearing Rights

The procedures and protections available for due process hearings under the IDEA are set out at 20 U.S.C. 1415(f), (h) and (k)(3) and 34 CFR §§300.511, 300.512, and 300.532. The New Mexico State rule, NMAC 6.31.2.13(I)(15), allows a party to request a summary due process hearing, which is granted unless the other party opposes it within five days of receiving the hearing request. The State rule characterizes this process as “voluntary.” The two procedures for hearings are not consistent. For example, the summary due process hearing requires expedited timelines and only provides for limited testimony. If a public agency requests a summary due process hearing and the parent does not timely object, the parent waives their right to a full hearing. The State’s model form does not provide parents a mechanism to request this option and the procedural safeguards notice does not contain information related to summary due process hearings, the differences between the two types of proceedings, or the timeline for objecting. NMPED informed OSEP that this process has not been used in the past six years. Based on this review, OSEP concludes that the New Mexico State rule for a summary due process hearing option is not consistent with the requirements of the IDEA and its implementing regulations. NMPED has notified OSEP that the State is taking action to revise its State rule to make it consistent with IDEA requirements.

Computation of Timelines

Under 34 CFR §300.11, “day” is defined as a calendar day unless otherwise indicated as business day or school day. The New Mexico State rule, NMAC 6.31.2.13(M)(1), states that if a required deadline falls on a weekend, the timeline will end on the next workday after the due date. This applies to all dispute resolution timelines such as the 30-day resolution period and the 45-day timeline for hearing decisions, but does not apply to timelines related to State complaints. The New Mexico State rule is not consistent with the definition of “day” established in the IDEA regulations. NMPED has notified OSEP that the State is taking action to revise its State rule to make it consistent with IDEA requirements.

Criteria for Exceptional Circumstances When Extending State Complaint Timelines

The IDEA regulations at 34 CFR §300.152(b), provide that the 60-day timelines for State complaint decisions may be extended for exceptional circumstances with respect to the specific complaint. OSEP reviewed State complaint files submitted by the State. OSEP reviewed 10 state complaint files while on sight, additionally NMPED provided one example where the SEA extended the 60-day timeline for a State complaint on the basis of SEA staff illness.

Unavailability of a specific complaint investigator is not an exceptional circumstance because States must have sufficient staff to carry out these requirements and unavailability of an investigator is not a circumstance that is limited to a specific complaint. OSEP notes that the State includes several other examples of exceptional circumstances in its SPP that do not meet the criteria for exceptional circumstances, including, “complaints filed on the cusp of winter or spring break periods when school staffs are not immediately available to respond and provide documents or be available for interviews and summer breaks when school staffs are not available to provide documentary responses or interviews and when schools are closed down and the SEB cannot retrieve needed student records and documents.” (NM SPP page 165, submitted February 1, 2011).

Extending the 45-Day Due Process Hearing Timeline

Under 34 CFR §300.515(c), a hearing officer may grant specific extensions of time beyond the 45-day due process hearing decision timeline at the request of either party. OSEP reviewed six due process files in which the hearing officer granted extensions to the 45-day timeline. In three instances, the hearing officer did not specify the amount of time by which the 45-day hearing decision timeline was being extended. OSEP noted that hearing officers granted extensions to a future hearing session but did not determine the date by which a final decision would be reached or the number of days by which the hearing timeline was extended in accordance with the requirements in 34 CFR §300.515(c).

OSEP Conclusion

To ensure that the State has procedures and practices that are reasonably designed to implement the dispute resolution requirements of IDEA, as required by IDEA sections 612(a)(11) and 615(a), 34 CFR §§300.151 through 153, and 20 U.S.C. 1221e-3, 34 CFR §§300.11, IDEA sections 615(b)(6) – (8), 615(c)(2), 615(f) – (i) and (o) and 34 CFR §§300.508, 300.510 through 300.513, 300.515, and 300.532, the State must have State rules and procedures that comply with IDEA, specifically the State must:

1. make available to the public model forms that comply with 34 CFR §§300.153(b), and 300.508(b);
2. ensure that hearing officers have complete authority to determine the sufficiency of all due process complaints filed and to determine jurisdiction for due process complaints that allege violations by the SEA consistent with 34 CFR §§300.508(d) and 300.513;
3. ensure that if the FIEP process is used, it is done consistent with the availability of resolution meetings and that appropriate calculations of the resolution period and due process hearing decision timelines are made, consistent with 34 CFR §§300.510 and 300.515(a);

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4. ensure that all due process hearings are consistent with 34 CFR §§300.511, 300.512, 300.513 and 300.532(c);
5. compute IDEA-imposed timelines based on calendar days, unless specified as school or business days, consistent with 34 CFR §300.11;
6. ensure that State complaint timeline extensions are consistent with 34 CFR §300.152(b); and
7. ensure that due process hearing timeline extensions are granted for a specific date by which the decision will be reached and mailed to the parties consistent with 34 CFR §300.515(c).

Based on the review of documents, analysis of data, and interviews with State and local personnel, as described above, OSEP concludes that the State does not have procedures and practices that are reasonably designed to implement the dispute resolution requirements of IDEA.

Required Actions/Next Steps

1. The State must:
 - a. within 90 days of the date of this letter, provide a Web link to updated due process and State complaint model forms that clearly indicates which information elements are required and are optional based on review of 34 CFR §§300.153(b) and 300.508(b);
 - b. within 90 days of the date of this letter, provide draft language for the proposed revisions to NMAC 6.31.2.13(H)(2)(a), NMAC 6.31.2.13(I)(5-6), and a timeline for completion of those revisions; and
 - c. with the FFY 2011 APR, due February 1, 2013, provide evidence that the State rules, NMAC 6.31.2.13(H)(2)(a) and NMAC 6.31.2.13(I)(5-6), have been revised to comply with 34 CFR §§300.153(b) and 300.508(b).
2. The State must:
 - a. within 90 days of the date of this letter, provide a Web link to the updated “Due Process Procedures Flowchart,” or provide evidence that NMPED has eliminated the “Due Process Procedures Flowchart,” demonstrating compliance with 34 CFR §300.508(d);
 - b. within 90 days of the date of this letter, provide draft language for the proposed revisions to NMAC 6.31.2.13(I)(3)(d), in compliance with 34 CFR §§300.508(d) and 300.513;
 - c. within 90 days of the date of this letter, provide a revised hearing officer appointment letter, consistent with the required changes in the NMAC; and
 - d. with the FFY 2011 APR, due February 1, 2013, provide evidence that the State rule, NMAC 6.31.2.13(I)(3)(d), has been revised to comply with 34 CFR

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§§300.508(d) and 300.513, and provide evidence that hearing officers have knowledge of the revised State rule, in accordance with 34 CFR §300.511(c)(1)(ii-iv).

3. The State must:

- a. within 90 days of the date of this letter, provide a draft New Mexico State rule that clarifies the timelines related to use of an FIEP meeting, including changes to NMAC 6.31.2.13.(I)(8)(a) and NMAC 6.31.2.13(G)(2)(c)(ii), and submit updated documentation including waiver forms, resolution tracking forms, and procedural safeguards notices that consistently explain the impact of using the FIEP process on due process timelines in accordance with 34 CFR §§300.510 and 300.515(a); and
- b. with the FFY 2011 APR, due February 1, 2013, provide evidence that the State rule has been revised to clarify the impact of using the FIEP process on due process timelines, in accordance with 34 CFR §§300.510 and 300.515(a).

4. The State must:

- a. within 90 days of the date of this letter, provide a draft New Mexico State rule that removes the summary due process option; and
- b. with the FFY 2011 APR, due February 1, 2013, provide evidence that the State has removed the summary due process hearing option from the NMAC.

5. The State must:

- a. within 90 days of the date of this letter, provide draft language of the proposed revisions to NMAC 6.31.2.13(M)(1), explaining that for the purpose of calculating dispute resolution timelines, “day” is defined as a calendar day unless otherwise indicated as business day or school day in compliance with 34 CFR §300.11; and
- b. with the FFY 2011 APR, due February 1, 2013, provide evidence that the State rule, NMAC 6.31.2.13(M)(1), has been changed to comply with 34 CFR §300.11.

6. The State must provide a written assurance within 90 days of the date of this letter that extensions of the 60 day timeline for complaints will only be permitted if exceptional circumstances exist with respect to a particular complaint in accordance with 34 CFR §300.152(b).

7. The State must:

- a. within 90 days of the date of this letter, provide evidence that hearing officers have been informed of the requirement to specify the amount of time by which the 45-day hearing timeline is extended or the date by which a final decision would be reached (e.g., through a letter sent to hearing officers or examples of training content); and

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- b. with the FFY 2011 APR, due February 1, 2013, provide evidence, such as examples of due process cases or updated due process logs, that demonstrates in practice, due process hearing timeline extensions meet the requirements of 34 CFR §300.515(c).

Critical Element 4: Data System

Does the State have a data system that is reasonably designed to timely collect and report data that are valid and reliable and reflect actual practice and performance?

To meet the requirements of IDEA sections 616 and 618, and 34 CFR §§300.601(b) and 300.640 through 300.646, the State must have a data system that is reasonably designed to timely collect and report data that are valid and reliable and reflect actual practice and performance.

Reporting Actual Target Data

NMPED encourages LEAs to correct noncompliance before issuing a finding. If NMPED finds noncompliance, they ask the LEA to send subsequent data for review, within 90 days. If the noncompliance has been corrected, the State makes no finding and considers that LEA to have 100% compliance, which is reflected in the actual target data reported in the APR. While OSEP's guidance allows SEAs to provide an LEA the opportunity to correct noncompliance prior to the issuance of a finding, the data reported in the APR must reflect the LEA's actual level of compliance (i.e., actual target data), prior to the opportunity to correct any noncompliance. It is inconsistent with the SPP/APR Measurement Table to include noncompliance that was corrected after the initial review when calculating the State's level of compliance when reporting actual target data in the APR.

Data Calculations

OSEP reviewed NMPED's data system, the Student Teacher Accountability Reporting System (STARS), while on-site. The STARS system is reasonably designed to timely collect and report data that reflect actual practice and performance; however, based on a review of specific indicator data, it appeared that NMPED was incorrectly calculating data for Indicator 7, early childhood outcomes. NMPED provided guidance to LEAs that incorrectly explained the calculation. At the time, LEAs in New Mexico converted both entry and exit scores into progress categories; however, the progress category cannot be determined based upon a single data point. Further, NMPED had classified progress levels "D," the percent of children who improved functioning to reach a level comparable to same-aged peers, and "E," the percent of children who maintained functioning at a level comparable to same-aged peers, as indicating different final outcomes. These procedures were inconsistent with the SPP/APR Measurement Table. NMPED worked with the Early Childhood Outcomes Center (ECO) and OSEP to address this issue prior to submitting its FFY 2010 APR. In the FFY 2010 APR, NMPED reported on the changes it has made to ensure the data it collects and reports for Indicator 7 are valid and reliable (i.e., that the reported data have been calculated according to the SPP/APR Measurement Table). No further action is required.

OSEP Conclusion

To ensure that the State has a data system that is reasonably designed to timely collect and report data that are valid and reliable and reflect actual practice and performance, as required by IDEA

sections 616 and 34 CFR §§300.157 and 300.601(b)(1), the State must correctly report actual target data in its SPP/APR in instances where correction of noncompliance occurs before the State issues a finding.

Based on the review of documents, analysis of data, and interviews with State and local personnel, as described above, OSEP concludes that the State does not have a data system that is reasonably designed to timely collect and report data that are valid and reliable and reflect actual practice and performance.

Required Actions/Next Steps

With its response, during the SPP/APR clarification period, to OSEP's FFY 2010 New Mexico Part B SPP/APR Status Table, the State must provide an explanation of how the State reports data when noncompliance is corrected prior to issuing a finding. The State must provide an assurance that the data included in the FFY 2010 APR are valid and reliable. (i.e., reflect the actual level of compliance, notwithstanding providing an LEA the opportunity to correct any noncompliance). If the State is not able to make this assurance, the State needs to explain the steps it will take in the future to ensure valid and reliable data in the FFY 2011 APR, due February 1, 2013.

Critical Element 5: Implementation of Grant Assurances

Does the State have procedures and practices that are reasonably designed to implement selected grant application assurances, i.e., monitoring and enforcement related to LEA determinations and significant disproportionality/Coordinated Early Intervening Services (CEIS)?

The State must have reasonably designed procedures and practices that address grant assurances/requirements if it is to implement the following selected grant assurances: (1) monitoring and enforcement related to LEA determinations pursuant to IDEA section 616 and 34 CFR §§300.600 through 300.604 and 300.608; (2) significant disproportionality requirements pursuant to IDEA section 618(d) and 34 CFR §300.646; and (3) CEIS requirements pursuant to IDEA sections 613(a)(2)(C) and (f) and 34 CFR §§300.205 and 300.226.

Determinations

NMPED maintains documentation asserting that the State considers A-133 audit findings in making LEA determinations. During the visit, NMPED informed OSEP that the State does not have a mechanism to consistently review subrecipients' audit findings when making determinations, consistent with IDEA section 616(a) and (e), and OSEP's *Questions and Answers on Monitoring, Technical Assistance and Enforcement*.⁴ Additionally, NMPED reported that the SEA does not make determinations on State-operated programs, indicating that few SPP/APR indicators are applicable to such programs. However, the State must make determinations on all LEAs and State-operated programs, according to 34 CFR §300.600(a)(2), using the factors set out in OSEP guidance that are applicable to the programs.

⁴ See Questions and Answers on Monitoring, Technical Assistance, and Enforcement (revised June 2009) <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C4%2C>.

Enforcement Actions

NMPED has a clearly stated rubric for making determinations and taking enforcement action for the Needs Assistance and Needs Intervention determination categories, but at the time of the visit, did not have a policy that addresses the Needs Substantial Intervention determination category, as required by 34 CFR §300.604(c). On November 21, 2011, NMPED provided an updated copy of the *New Mexico Integrated Special Education Accountability System—A Comprehensive Monitoring Approach to Improving Outcomes for Students with Disabilities (ISEAS)*, which includes an explanation of enforcement actions that can be taken, in the event that an LEA receives the determination of Needs Substantial Intervention. No further action is required.

OSEP Conclusion

To ensure that the State has procedures and practices that are reasonably designed to implement monitoring and enforcement related to LEA determinations as required by IDEA section 616 and 34 CFR §§300.600 through 300.604 and 300.608, the State must implement procedures to consider LEA-specific audit findings when making determinations, consistent with IDEA section 616(a) and (e), and OSEP's *Questions and Answers on Monitoring, Technical Assistance and Enforcement*, and to make determinations for State-operated programs, in accordance with 34 CFR §300.600(a)(2). Based on the review of documents, analysis of data, and interviews with State and local personnel, as described above, OSEP concludes that the State does not have procedures and practices that are reasonably designed to implement selected grant requirements related to LEA determinations.

In addition, OSEP currently is reviewing the State's submission of the Part B Report on Maintenance of Effort Reduction and Coordinated Early Intervening Services (Table 8) data relating to LEA MOE, LEA determinations, significant disproportionality and CEIS and may have further communication with the State about that information. OSEP makes no conclusions in this enclosure about any issues that may be raised by the Table 8 data.

Required Actions/Next Steps

The State must:

1. within 90 days of the date of this letter, provide written procedures that explain NMPED's mechanism to consider LEA-specific A-133 audit findings when making LEA determinations, in accordance with 34 CFR §300.616(a) and (e);
2. within 90 days of the date of this letter, provide written procedures for how the State plans to make determinations for State-operated programs, in accordance with 34 CFR §300.600(a)(2); and
3. with the FFY 2011 APR, due February 1, 2013, provide evidence that the State has implemented the procedures to make determinations for State-operated programs, in accordance with 34 CFR §300.600(a)(2).